Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd

HIGH COURT (KUALA LUMPUR) — WRIT NO WA-24NCC-179–04 OF 2016
MOHD NAZLAN J
3 OCTOBER 2018

Civil Procedure — Proceedings — Committal proceedings — Leave for committal proceeding granted against defendant — Defendant applied to set aside leave for committal proceeding — Whether defendant could set aside leave for committal proceeding — Whether setting aside applications defective for being out of time — Whether personal service and time speculation mandatory — Whether inspection order wide and ambiguous — Whether there was failure in full and frank disclosure — Whether there were other factors affecting application to set aside committal proceeding — Rules of Court 2012 O 42 rr 3, 6 & 13, O 45 r 5

These applications were filed by the defendant ('encl 127') and two others ('encl 125') for the setting aside of the leave for committal proceedings previously granted against them. The plaintiff was a director of the defendant company. He was successful in his application for an inspection order of the accounting records of the defendant be granted to the plaintiff's auditors under s 167 of the Companies Act 1965 ('the Act'). The inspection order was granted on 16 January 2017. The present proceeding found its origin in the very inspection order. The plaintiff now alleged that the defendant company and two others, namely Suresh Emmanuel Abishegam ('Suresh') the Chief Executive Officer of the defendant company, and Azian bt Abdul Aziz ('Azian'), whom the plaintiff claimed was the defendant's head of finance were responsible for acts and omissions frustrating, stultifying and otherwise breaching para 1(i) and (ii) of the inspection order. On 4 April 2017, the present court granted leave to the plaintiff to apply for an order for committal against the three. For the record, leave had also been granted against four others, who were directors of the defendant company but the leave was subsequently withdrawn and struck out on 23 April 2017. In support of their respective setting aside applications, each of the defendant, Suresh and Azian also filed an application for an extension of time to make the setting aside applications in the same enclosures for the setting aside. The defendant anchored its application to set aside the inspection order on three primary grounds. These were first, the inspection order did not specify time for compliance; secondly, it was vague and too wide and thirdly, there was omission of material facts by the plaintiff when applying for leave. The issues for determination by the court were: (a) whether the setting aside applications were defective for out of time; (b) whether personal service and time stipulation were mandatory; (c) whether the inspection order was too wide and

ambiguous; (d) whether there was failure in full and frank disclosure; and (e) whether there were other factors justifying the application to set aside the leave for committal proceedings.

Held, allowing encls 125 and 127 with costs:

(1) It could not be disputed that the applications for the setting aside of the leave for committal proceedings were only filed about six months after the expiry of the deadline of 30 days as specified under O 42 r 13 of the Rules of Court 2012 ('the ROC'), after receipt of the inspection order. They were thus filed out of time. The simultaneous filing of the enlargement and the setting aside applications merely meant that the court would first consider the extension request, and only if granted, would it be necessary to proceed to hear the setting aside. The explanation proffered by the defendant and the other two in engaging global settlement negotiations to achieve an amicable resolution was reasonable and satisfactory. In any event, a key consideration was that the plaintiff could not be said to have suffered any real prejudice by this delay. Despite its contestation, the global settlement efforts did take place, and had they been successful, there would not have been any need for any further proceedings on the committal action (see paras 16, 18, 20–21 & 25).

(2) The thrust of the inspection order was not so much of directing the defendant not to prevent or disrupt the inspection order. Instead, prayer 1 of the inspection order focused more on the need for the defendant to make available and open for inspection the accounting records. The inspection order required the defendant to cooperate and facilitate the process. Surely in order to achieve that it would had necessitated the defendant taking active and positive steps to make it happen. Prayer 1 of the inspection order was therefore a form of a positive order. It required an act to be done (see paras 46 & 49–52).

(3) The parties agreed that the requirement for personal service and time stipulation were pre-requisite for a positive order, but not if it was a passive order. Given that the inspection order, being an order containing a direction to the defendant to do an act did not stipulate the time for compliance as required under O 42 r 6(1) of the ROC; and that the plaintiff failed to effect personal service of the inspection order contrary to O 45 r 7(6) of the ROC, enforcement of the inspection order against the contemnors therefore could not be pursued under O 45 r 5 of the ROC. The substantive hearing for committal against the proposed contemnors was no longer legally possible and must fail. A such, leave earlier granted to the plaintiff to commence committal proceedings ought to be set aside (see paras 32 & 54–56).

(4) Since the inspection order authorised the auditor who did not have the same inspection right as a director he represented, it could not be said that the right of the auditor was similarly unbridled. Section 167(6) of the Act itself recognised certain elements of distinction and limitation in the role undertaken by the auditor by virtue of the words 'in any particular case'. Under such circumstances, it was not inaccurate to state that the inspection order was ambiguous and equivocal in its scope to the extent that enforcement for an alleged non-compliance could not be sustained. Given that the inspection order was intended to allow the auditor of the director to conduct the requisite inspection, the open-endedness and the lack of specificity on the accounting periods rendered the inspection order vague, too wide and ambiguous (see paras 62 & 64).

(5) The full and material facts surrounding the accusation of non-observance of the inspection order against the defendant were not particularised in the amended O 52 statement. The facts concerning the attempts by the defendant to make available certain of the documents were only included in the accompanying affidavit. This was clearly a departure from what the law on contempt had so specifically provided for. The lapse on the part of the plaintiff was incurably defective and fatal. On this ground alone, the leave granted to institute contempt proceedings against the proposed contemnors ought to be set aside (see paras 69 & 77).

(6) The pursuit of contempt against the defendant was unsustainable and could not be pursued also by reason of the fact that Azian was not named in the penal endorsements in the inspection order. Azian was never personally served with the inspection order in the first place, and neither was she named in the penal notice. She was thus never put on notice to the act ordered to do, disobedience of which would subject her to penal consequences. Failure to indorse an order of court with a penal notice was fatal to an application for committal. Order 45 r 5(1)(B) envisaged an officer against whom committal might be pursued to be an officer of a body corporate, and this body corporate was the entity which was alleged to have failed to do the act it was directed to do as specified in the order of court. But Azian was not an officer of the defendant company which was subjected to the inspection order. She was a representative of a shareholder of the defendant. It rendered her not to be a proper party to the committal proceedings (see paras 78–80).

[Bahasa Malaysia summary

Permohonan-permohonan ini difailkan oleh defendan ('lampiran 127') dan dua yang lain ('lampiran 125') untuk mengetepikan kebenaran untuk prosiding komital yang sebelum ini diberikan kepada mereka. Plaintif adalah pengarah syarikat defendan. Beliau telah berjaya dalam permohonannya untuk mendapatkan perintah pemeriksaan rekod perakaunan defendan diberikan

kepada juruaudit plaintif di bawah s 167 Akta Syarikat 1965 ('Akta'). Perintah pemeriksaan itu telah diberikan pada 16 Januari 2017. Prosiding ini berdasarkan perintah pemeriksaan tersebut. Plaintif kini mendakwa bahawa syarikat defendan dan dua yang lain, iaitu Suresh Emmanuel Abishegam ('Suresh') Ketua Pegawai Eksekutif syarikat defendan, dan Azian bt Abdul Aziz ('Azian'), yang mana plaintif mendakwa bahawa ketua kewangan defendan bertanggungjawab terhadap perbuatan dan kelalaian yang menghalang, membuntukan dan selain melanggar perenggan 1(i) dan (ii) perintah pemeriksaan. Pada 4 April 2017, mahkamah ini memberi kebenaran kepada plaintif untuk memohon suatu perintah untuk komital terhadap ketiganya. Untuk makluman, kebenaran juga telah diberikan kepada empat yang lain, yang merupakan pengarah syarikat defendan tetapi kebenaran itu kemudian ditarik balik dan dibatalkan pada 23 April 2017. Bagi menyokong permohonan pengenepian mereka, setiap defendan, Suresh dan Azian juga memfailkan permohonan untuk lanjutan masa untuk membuat permohonan pengenepian dalam lampiran yang sama untuk pengenepian itu. Defendan menyokong permohonan beliau untuk mengetepikan perintah pemeriksaan dengan tiga alasan utama. Yang pertama, perintah pemeriksaan tidak menentukan masa untuk pematuhan; kedua, ia adalah samar-samar dan terlalu luas dan ketiga, terdapat peninggalan fakta material oleh plaintif apabila memohon kebenaran. Isu-isu untuk penentuan oleh mahkamah adalah: (a) sama ada permohonan pengenepian telah cacat kerana di luar masa; (b) sama ada penyampaian secara peribadi dan ketetapan masa adalah mandatori; (c) sama ada perintah pemeriksaan terlalu luas dan samar-samar; (d) sama ada terdapat kegagalan dalam pendedahan penuh dan jujur; dan (e) sama ada terdapat faktor lain yang membenarkan permohonan untuk mengetepikan kebenaran untuk prosiding komital.

Diputuskan, membenarkan lampiran 125 dan 127 dengan kos:

(1) Tidak boleh dipertikaikan bahawa permohonan untuk mengetepikan kebenaran untuk prosiding komital hanya difailkan kira-kira enam bulan selepas tamat tempoh 30 hari sebagaimana yang ditetapkan di bawah A 42 k 13 Kaedah-Kaedah Mahkamah 2012 ('KKM'), selepas menerima perintah pemeriksaan. Oleh itu, ianya difailkan di luar masa. Pemfailan secara serentak mengenai pertambahan dan permohonan pengenepian hanya bermaksud bahawa mahkamah terlebih dahulu akan mempertimbangkan permintaan lanjutan, dan hanya jika diberikan, adakah perlu untuk meneruskan untuk mendengar pengenepian. Penjelasan yang diajukan oleh defendan dan dua lagi dalam mengadakan rundingan penyelesaian global untuk mencapai resolusi yang baik adalah wajar dan memuaskan. Dalam apa jua keadaan, pertimbangan utama adalah bahawa plaintif tidak boleh dikatakan telah mengalami apa-apa prejudis sebenar dengan kelewatan ini. Walaupun pertikaiannya, usaha penyelesaian global dilakukan, dan sekiranya berjaya, tidak akan ada

sebarang keperluan untuk sebarang prosiding lanjut mengenai tindakan komital (lihat perenggan 16, 18, 20–21 & 25). A

(2) Teras perintah pemeriksaan itu tidak banyak mengarahkan defendan supaya tidak menghalang atau mengganggu perintah pemeriksaan. Sebaliknya, permohonan 1 perintah pemeriksaan memberi tumpuan lebih kepada keperluan bagi defendan untuk bersedia dan terbuka untuk pemeriksaan rekod perakaunan. Perintah pemeriksaan itu memerlukan defendan untuk bekerjasama dan memudahkan proses itu. Tentunya untuk mencapai itu ia akan memerlukan defendan mengambil langkah-langkah yang aktif dan positif untuk membolehkan ianya berlaku. Oleh itu, permohonan 1 perintah pemeriksaan adalah satu bentuk perintah positif. Ia memerlukan tindakan yang perlu dilakukan (lihat perenggan 46 & 49–52). B C

(3) Pihak-pihak bersetuju bahawa keperluan untuk penyampaian secara peribadi dan ketetapan masa adalah prasyarat untuk suatu perintah positif, tetapi tidak jika perintah itu pasif. Memandangkan perintah pemeriksaan itu, sebagai perintah yang mengandungi arahan kepada defendan untuk melakukan sesuatu tindakan tidak menetapkan masa untuk pematuhan sebagaimana yang dikehendaki di bawah A 42 k 6(1) KKM; dan bahawa plaintif gagal untuk melaksanakan penyampaian secara peribadi perintah pemeriksaan yang bertentangan dengan A 45 k 7(6) KKM, penguatkuasaan perintah pemeriksaan terhadap penghina itu tidak dapat dilaksanakan di bawah A 45 k 5 KKM. Perbicaraan substantif untuk komital terhadap penghina yang dicadangkan itu tidak lagi sah dan harus gagal. Oleh itu, kebenaran pada awalnya yang diberikan kepada plaintif untuk memulakan prosiding komital perlu diketepikan (lihat perenggan 32 & 54–56). D E F

(4) Oleh kerana perintah pemeriksaan memberi kuasa kepada juruaudit yang tidak mempunyai hak pemeriksaan yang sama seperti pengarah yang diwakilinya, ia tidak boleh dikatakan bahawa hak juruaudit sama sekali tidak terkawal. Seksyen 167(6) Akta sendiri mengiktiraf beberapa elemen perbezaan dan batasan dalam peranan yang diambil oleh juruaudit berdasarkan perkataan 'dalam mana-mana hal tertentu'. Di bawah keadaan sedemikian, adalah tidak tepat untuk menyatakan bahawa perintah pemeriksaan adalah samar-samar dan kabur dalam skopnya sehingga tahap penguatkuasaan untuk ketidakpatuhan yang dikatakan tidak dapat dikekalkan. Memandangkan perintah pemeriksaan itu bertujuan untuk membolehkan juruaudit pengarah menjalankan pemeriksaan yang diperlukan, keterbukaan dan kekurangan kekhususan pada tempoh perakaunan yang menyebabkan perintah pemeriksaan itu samar-samar, terlalu luas dan kabur (lihat perenggan 62 & 64). G H I

(5) Fakta penuh dan material yang mengelilingi tuduhan tidak mematuhi

perintah pemeriksaan terhadap defendan tidak diperincikan dalam pernyataan perintah 52 yang dipinda. Fakta mengenai percubaan oleh defendan untuk menyediakan beberapa dokumen itu hanya termasuk dalam afidavit yang disertakan. Ini jelas merupakan penyimpangan dari apa yang diperuntukkan oleh undang-undang berhubung penghinaan. Kesilapan pihak plaintif tidak dapat disangkal secara fizikal dan fatal. Berdasarkan alasan ini sahaja, kebenaran yang diberikan untuk memulakan prosiding penghinaan terhadap penghina yang dicadangkan perlu diketepikan (lihat perenggna 69 & 77).

(6) Pemburuan penghinaan terhadap defendan tidak dapat dikekalkan dan juga tidak dapat dikejar oleh kerana bahawa Azian tidak dinamakan dalam pengendorsan penal dalam perintah pemeriksaan. Azian tidak pernah disampaikan secara peribadi dengan perintah pemeriksaan pada mulanya, dan beliau juga tidak dinamakan dalam notis penal. Oleh itu, beliau tidak pernah dimaklumkan kepada tindakan yang diperintahkan untuk dilakukan, ketidakpatuhan yang akan menyebabkan akibat penal. Kegagalan untuk menyokong tuntutan perintah mahkamah dengan notis penal adalah fatal kepada permohonan untuk komital. Aturan 45 k 5(1)(B) menggambarkan seseorang pegawai terhadap komital boleh dikejar menjadi pegawai suatu pertubuhan perbadanan, dan perbadanan korporat ini adalah entiti yang didakwa telah gagal melakukan perbuatan yang diarahkan untuk dilakukan seperti yang ditentukan dalam perintah mahkamah. Tetapi Azian bukanlah pegawai syarikat defendan yang tertakluk kepada perintah pemeriksaan. Beliau adalah seorang wakil pemegang saham defendan. Ia menjadikan beliau tidak menjadi pihak yang sesuai dengan prosiding komital (lihat perenggan 78–80).]

Notes

For a case on committal proceedings, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) para 8222.

Cases referred to

Bramblevale Ltd, Re [1970] Ch 128, CA (refd)
Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd [2018] 8 MLJ 394, HC (refd)
Dewan Perniagaan Melayu Malaysia Negeri Johor v Menteri Besar Johor & Ors [2016] 7 MLJ 1, HC (refd)
Dewan Perniagaan Melayu, Malaysia Negeri Johor v Menteri Besar Johor & Ors [2017] MLJU 562; [2017] 10 CLJ 632, HC (refd)
Grenek Sdn Bhd v Lew Wa Chow [1991] 1 MLJ 125, HC (refd)
Harmsworth v Harmsworth [1987] 3 All ER 816, CA (refd)
Hitachi Shin Din Cable Ltd, Re [2005] 2 HKLRD 311 (refd)
Hong Kwi Seong v Ganad Media Sdn Bhd and another appeal [2013] 6 MLJ 765, FC (refd)

Iberian Trust, Limited v Founders Trust and Investment Company, Limited [1932] 2 KB 87, KBD (refd)
Loh Eng Leong & Anor v Lo Mun Sen & Sons Sdn Bhd & Anor [2003] 4 MLJ 284, CA (refd)
Mohd Azlan bin Hj Zainal Abidin & Ors v Pegawai Penerima Syarikat Cosmopro & Ors [2015] 10 MLJ 107, HC (distd)
Patricia Liew Yam Ngoon v MME Fashion Sdn Bhd [1996] 5 MLJ 127, HC (refd)
Shining Crest Sdn Bhd & Ors v Malaysia Building Society Bhd [2018] 1 LNS 342, HC (refd)
Syarikat M Mohamed v Mahindapal Singh & Ors [1991] 2 MLJ 112, HC (refd)
Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458; [2012] 2 CLJ 849, FC (refd)
Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang [2013] 5 MLJ 541; [2013] 1 CLJ 1060, CA (refd)

Legislation referred to

Companies Act 1965 s 167, 167(3), (5), (6)
Rules of Court 2012 O 42 rr 6, 6(1), 13, O 45 rr 5, 5(1), 5(1)(B), 7, 7(4), 7(6), O 52, O 52 rr 3, 6
Rules of the High Court 1980 O 42 r 1, O 45 r 5

Pang Kok Leng (Samantha Su Xiu Ming with him) (Cheah Teh & Su) for the plaintiff.
David Mathews (Olivia Loh, Malarvily Perumal and Yeoh Kar Ying with him) (Gananathan Loh) for the defendant.
Muhammad Shafee Abdullah (Harvinderjit Singh, Sarah Abishegam, Sara Ann Choy Sue May and Harvinder Singh Sidhu with him) (Vin Law & Co) for Suresh and Azian.

Mohd Nazlan J:

INTRODUCTION

[1] This concerns applications by the defendant (encl 127) and two others (encl 125) for the setting aside of the leave for committal proceedings previously granted against them.

[2] After having heard submissions by parties at the hearing, I allowed the applications and stated my key grounds for so deciding. This judgment contains the full grounds for my decision.

A KEY BACKGROUND FACTS

[3] There is a fair bit of history of court proceedings involving the parties to this application. For present purposes however, it suffices I refer to them only in summary fashion.

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[4] The plaintiff is a director of the defendant company. He was successful in his application for an inspection order of the accounting records of the defendant be granted to the plaintiff's auditors under s 167 of the Companies Act 1965 ('the inspection order'). The inspection order was granted on 16 January 2017, and the judgment concerning that application is reported in *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2018] 8 MLJ 394.

C

D

[5] The present proceeding found its origin in the very inspection order. The plaintiff now alleged that the defendant company and two others, namely Suresh Emmanuel Abishegam ('Suresh') the CEO of the defendant company, and Azian bt Abdul Aziz ('Azian'), whom the plaintiff claimed is the defendant's head of finance were responsible for acts and omissions frustrating, stultifying and otherwise breaching para 1(i) and (ii) of the inspection order. On 4 April 2017, this court granted leave to the plaintiff to apply for an order for committal against the three.

E

[6] For the record, leave had also been granted against four others, who are directors of the defendant company. But this leave was subsequently withdrawn and struck out on 23 April 2017.

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[7] In support of their respective setting aside applications, each of the defendants, Suresh and Azian also filed an application for an extension of time to make the setting aside applications in the same enclosures for the setting aside.

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[8] Hence the extension of time and setting aside applications now before me.

H

SUMMARY OF THE KEY CONTENTION OF PARTIES

[9] The defendant anchors its application to set aside the inspection order on three primary grounds. These are first, the inspection order does not specify time for compliance; secondly, it is vague and too wide and thirdly, there is omission of material facts by the plaintiff when applying for leave.

I

[10] Suresh and Azian, in an application in encl 127 and in separate written submissions, rely on similar grounds to set aside the inspection order. These are

the absence of personal service, the non-specification of time for compliance, that the inspection order is too wide, ambiguous and vague, and that the plaintiff is guilty of material non-disclosure in its application for leave to commence contempt proceedings.

[11] In addition, Azian also submits that she was not named in the penal endorsements in the inspection order, and that she is not even an officer employed by the defendant company.

[12] The plaintiff, in its opposition to these applications, submitted that the setting aside applications by the three are out of time, did not comply with O 42 r 13 of the Rules of Court 2012 ('the RC 2012') and ought therefore to be dismissed on this ground alone.

[13] In respect of the setting aside applications, the plaintiff made the important contention that there is no requirement for time stipulation and personal service because the relevant part of the inspection order is one in the nature of an order 'to abstain from doing an act' which under O 45 r 5(1) of the RC 2012 does not require any compliance with penal notice or time specification provisions, and that the defendant. Suresh and Azian in any event had notice of the inspection order.

[14] The plaintiff further argued that the inspection order is not vague or too wide, and denied that there was any material non-disclosure in obtaining leave. In particular, the plaintiff maintains there was full and frank disclosure on all material matters especially between 8 March 2017 and 3 April 2017 which had been included in the affidavit (encl 106) which was referred to in the application for leave.

[15] The argument that Azian is not a proper party is countered by the plaintiff's assertion that a third party may be subject to contempt proceedings if one actively obstructs the course of justice.

THE EVALUATION AND FINDINGS OF THIS COURT

Whether the setting aside applications are defective for out of time

[16] It cannot be seriously disputed that the applications for the setting aside of the leave for committal proceedings (encl 127 by the defendant and encl 125 by both Suresh and Azian) were only filed about six months after the expiry of the deadline of 30 days as specified under O 42 r 13 of the RC 2012, after receipt of the inspection order. Receipt was on 18 April 2017 by the defendant, and 4 May 2017 by Suresh and Azian. The setting aside applications were made by all on 4 December 2017. They were thus filed out of time.

[17] It is true that case law authorities referred to by the plaintiff such as the High Court decisions in *Mohd Azlan bin Hj Zainal Abidin & Ors v Pegawai Penerima Syarikat Cosmopro & Ors* [2015] 10 MLJ 107 and *Shining Crest Sdn Bhd & Ors v Malaysia Building Society Bhd* [2018] 1 LNS 342 establish that the requirement is strict and mandatory, and that non-compliance should result in the refusal of the setting aside application.

[18] Further, as also contended by the plaintiff, the Federal Court also held in *Hong Kwi Seong v Ganad Media Sdn Bhd and another appeal* [2013] 6 MLJ 765 that any application for enlargement of time ought to be applied for prior to the filing of the setting aside application. In the instant case before me, the extension of time applications were made in the same requests for setting aside of the leave.

[19] However, it is important to observe the relevant passages from the judgment of the Federal Court in *Hong Kwi Seong* as follows:

> [12] In other words a party intending to set aside an order or judgment must make his application and serve it on the party who obtained the order or judgment within thirty days after receipt of the order or judgment by him. *If the application is made outside the thirty day period, unless time is enlarged, the application must fail* (*Development & Commercial Bank Ltd v Dinesh Kumar a/l Jashbhai Nagjibhai & Ors* [2002] 7 MLJ 430; [2002] 3 CLJ 108). Whether an enlargement of time will be granted, on the premise that an application was been filed, will depend very much on the facts and circumstances of that application (*VVDN Sockalingam Chettiar And Two Others v KRPRSM Somasundaram Chettiar* [1941] 1 MLJ 103 (CA)).
>
> [13] It is crystal clear that no enlargement of time was ever applied for by the appellant prior to the filing of encls 129–130. A brief scrutiny of the dates of all of the relevant orders, and their dates of service, shows that the appellant was out of time by at least a year. Despite knowing that encls 129–130 were filed pursuant to O 42 r 13 of the RHC the appellant had disregarded the time factor prescribed to regularise the application. *With no application filed to extend time pursuant to O 3 r 5 of the RHC prior to filing of those applications (and of course no reasonable explanation was given for the said delay), encls 129–130 were incompetent.* (Emphasis added.)

[20] In my view, two key aspects stand out from the above. One is that there was no application to extend time in that case. Secondly, there was no reasonable explanation for the delay. The situation is therefore quite unlike the facts in the case now before me. The defendant and the other two have made the application to enlarge time in the same setting aside applications in encls 125 and 127. I do not think *Hong Kwi Seong* meant to rule that the enlargement application must mandatorily be filed before the setting aside application.

[21] Even in the case before me the simultaneous filing of the enlargement and the setting aside applications merely mean that the court will first consider the extension request, and only if granted, would it be necessary to proceed to hear the setting aside. Just like what I am undertaking presently.

[22] The explanation proffered by the defendant and the other two is that parties were engaged in global settlement negotiations to achieve an amicable resolution and that it had been agreed that proceedings be put on hold to facilitate this. However the plaintiff disputes there was any agreement to put the committal proceedings on hold. Instead the only understanding was that parties might take longer time to reply to affidavits.

[23] The fact that parties had tried to negotiate for a global settlement was not unknown to the court. It had even been mentioned in case management sessions. The longer time taken to reply to affidavits was also understood to be due to the concurrent discussions on possible settlement. Even though the defendant and the rest first expressed the intention to file the setting aside application well after the expiry of the requisite 30-day period, this, my view was attributable to precisely the on-going settlement negotiations which then did not raise the need for any setting aside.

[24] And the records also showed that the deputy registrar gave directions to file the setting aside applications by 4 December 2017, which were adhered to by the parties.

[25] In my view the explanation proffered by the parties is reasonable and satisfactory, which was not the situation in *Mohd Azlan bin Hj Zainal Abidin*, *Shining Crest Sdn Bhd* and *Hong Kwi Seong*. Furthermore the extension of time has also been applied, unlike in those cases cited by the plaintiff in submission. In any event, a key consideration is that the plaintiff could not be said to have suffered any real prejudice by this delay. Despite its contestation, the global settlement efforts did take place, and had they been successful, there would not have been any need for any further proceedings on the committal action.

[26] The plaintiff also argued that he was prejudiced because the parties could easily raise the present contentions to oppose leave at the substantive hearing for the contempt, given that the grounds are substantially the same, and not delay the same by now attempting to first set aside the leave. I think this is misconceived because the nature of the hearings are very different.

[27] The first is a more simple process of hearing an application to set aside an ex parte leave. The second is a substantive hearing, of a quasi-criminal nature, necessitating the presence of the alleged contemnors, for a guilty

finding may potentially expose them to a jail sentence. For that reason O 52 r 6 confers on them the right to defend themselves in open court, including the right to give oral evidence.

[28] There is also nothing stopping the alleged contemnors to apply for the deponent of the affidavits of the plaintiff, in this case, the plaintiff himself, to be cross examined. But that would only happen if allowed by the court, and if the substantive hearing is indeed being pursued. All that would be unnecessary if the alleged contemnors, like the defendant and the other two applicants herein, are able to justify the setting aside of the leave.

[29] Accordingly, on the basis of the foregoing, given the explanation for the delay which I found reasonable and satisfactory, and in the absence of any true prejudice shown by the plaintiff, I allow the extension of time applied for by the defendant, Suresh and Azian to file the applications to set aside the leave granted to the plaintiff against the three parties.

Whether personal service and time stipulation are mandatory — Is the inspection order an order to 'do an act' or to 'refrain from doing an act'?

[30] It is a principal contention of the defendant as well as Suresh and Azian (collectively 'the proposed contemnors') that the ex parte leave ought to be set aside since the inspection order is defective and fatal as it does not contain any stipulation as to time for compliance. It is also a key complaint of the proposed contemnors that the plaintiff had failed to effect personal service of the inspection order on Suresh and Azian.

[31] It is apposite for para 1(i) and (ii) of the inspection order be reproduced hereunder:

> The accounting and other records ('Accounting Records') of the Defendant required to be kept pursuant to section 167 of the Companies Act, 1965 be:
>
> (i) open to inspection by Chan Kuan Chee (NRIC No 670304-10-6297) [License No. 2271/10/17(J)], an approved company auditor ('Auditor') and partner of Crowe Horwath (Firm No AF1018), acting for the Plaintiff, a director of the Defendant and/or by the Auditor's colleagues from Crowe Horwath; and
>
> (ii) available for the Auditor and/or his colleagues from Crowe Horwath to make copies of and/or take extracts from the Accounting Records;
>
> upon the undertaking in writing given by the Auditor to the High Court that information acquired by him and/or his colleagues from Crowe Horwath during the inspection shall not be disclosed by him and/or his colleagues from Crowe Horwath except to the Plaintiff, as per Annexure A.

[32] The point of contention on the above stated prayer 1 of the inspection order is a well-defined dispute whether it entails a positive order or an order to do an act on the one hand or a passive order or an order to abstain from doing an act, on the other hand. This determination is especially crucial since parties are in agreement that the requirement for personal service and time stipulation are pre-requisite for a positive order, but not if it is a passive order.

[33] This much, as agreed by the parties is in light of the relevant clear provisions of the Rules of Court 2012 ('the RC 2012') which in the applicable O 42 r 6 reads as follows:

> 6 Judgment requiring act to be done: Time for doing it (O 42 r 6)
>
> (1) *Subject to paragraph (2), a judgment or order which requires a person to do an act shall specify the time after service of the judgment or order, or some other time, within which the act is to be done.*
>
> (2) Where the act which any person is required by any judgment or order to do is to pay money to some other person, give possession of any immovable property or deliver any movable property, a time within which the act is to be done need not be specified in the judgment or order in accordance with paragraph (1), but the foregoing provision shall not affect the power of the Court to specify such a time and to adjudge or order accordingly. (Emphasis added.)
>
> 6 Judgment or order requiring act to be done: Order fixing time for doing it (O 45 r 6)
>
> (1) Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which the act is to be done, the Court shall, without prejudice to Order 3, rule 5, have power to make an order requiring the act to be done within another time, being such time after service of that order, or such other time as may be specified therein.
>
> (2) Where, notwithstanding Order 42, rule 6(1), or by reason of Order 42, rule 6(2), a judgment or order requiring a person to do an act does not specify a time within which the act is to be done the Court shall have power subsequently to make an order requiring the act to be done within such time after service of that order, or such other time, as may be specified therein.
>
> (3) An application for an order under this rule shall be made by notice of application and such notice of application shall, notwithstanding anything in Order 62, rule 10, be served on the person required to do the act in question.

[34] Authorities are not divided on the point that the requirement of O 42 r 6(1) must be strictly adhered to. Failure to do so would entitle an alleged contemnor to set aside the order (see the Court of Appeal decision in *Loh Eng Leong & Anor v Lo Mun Sen & Sons Sdn Bhd & Anor* [2003] 4 MLJ 284 and the

A High Court decision of Mohamed Dzaiddin J (later CJ) in *Grenek Sdn Bhd v Lew Wa Chow* [1991] 1 MLJ 125).

[35] It also means that non-adherence to O 42 r 6(1) renders enforcement of an order by way of committal under O 45 r 5 unsustainable. The latter reads:

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> 5 Enforcement of judgment to do or abstain from doing an act (O 45 r 5)
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> (1) Where —
>
> (a) *a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or*
>
> C
>
> (b) *a person disobeys a judgment or order requiring him to abstain from doing an act, then, subject to these Rules, the judgment or order may be enforced by one or more of the following means:*
>
> D
>
> (A) with the leave of the Court, an order of committal;
>
> (B) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;
>
> E
>
> (C) subject to the provision of the Debtors Act 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

[36] Committal proceedings cannot be sustained unless the act in respect of F the order in question is not done within the time specified for compliance. I have also made an observation on this issue in *Dewan Perniagaan Melayu, Malaysia Negeri Johor v Menteri Besar Johor & Ors* [2017] MLJU 562; [2017] 10 CLJ 632, a case involving a committal hearing of as follows:

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> [52] It is worthy of emphasis that the concern pertaining to the absence of time for compliance is critical point that weighs considerably against the case of applicant. This is not in keeping with firstly, O 42 r 6 of the Rules of Court 2012 ('the RC 2012') on the requirement to specify time and secondly, a number of case law authorities which ruled that in the absence of such time specification, a court order is unenforceable and the party against whom it is made is entitled as of right to have
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> H
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> it set aside (see *Loh Eng Leong & Anor v Lo Mun Sen & Sons Sdn Bhd & Anor* [2003] 4 MLJ 284).
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> [53] Order 42 r 6(1) of the RC 2012 provides that a judgment or order which requires a person to do an act shall specify the time after service of the order within which the act is to be done. The requirements of O 42 r 6 must be strictly adhered to before an order can be entered by reason of the failure of a party to do an act within a specified time. It is abundantly clear that if time for compliance is not specified, establishing a case for committal becomes a near impossibility given the criminal nature of the proceedings requiring proof beyond reasonable doubt which
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> I

further also emphasises the requirement for the order in question to be free from ambiguity, as well as, again, for any vagueness to be resolved in favour of the proposed contemnors.

[54] This proposition of law is also both logical and practical for it is difficult to appreciate how one can be ruled to be in breach of a court order if it is not imposed on him the time during which he is to perform the said task, especially which is in the form of a mandatory obligation just like the prayers in the second consent order ...

...

[59] I reiterate that any committal proceedings premised on the alleged non-compliance with a court order which does not contain any specification of time for compliance is fundamentally flawed. Accordingly, I hold that the failure to specify time for compliance in respect of the mandamus order is absolutely fatal to the plaintiff's application for an order of committal against the respondents vis a vis the allegation of the latter' violation of the terms of the mandamus order.

[37] The submission of the plaintiff is that the said inspection order directs the defendant to abstain from doing an act — which is preventing the plaintiff's auditor from inspecting the accounting records of the defendant company. The proposed contemnors take a diametrically opposite stance.

[38] The plaintiff places much reliance on the Hong Kong case of *Re Hitachi Shin Din Cable Ltd* [2005] 2 HKLRD 311 in support of his argument that that inspection order is in the nature of a passive order. It is asserted that there are no positive acts required to be done. The defendant and its officers were already required by statute in s 167(3) of the Companies Act 1965 as applicable then to ensure its accounting records are open to inspection, including the right to make copies.

[39] The plaintiff maintains that there is therefore no positive act to 'open' or 'make' available accounting records. And this, according to the plaintiff is in contradistinction to the requirements of prayer 2 of the inspection order which clearly is an order to do an act which is to furnish or provide certain identified documents to the plaintiff within the time frame stipulated therein.

[40] In *Re Hitachi* where the court considered the Hong Kong rules of court similar to our order it was stated as follows:

8. Mr James Cheng submits, really by way of preliminary issue (and so I take it first), that the Judge's order is of no effect because it falls foul of O 42 r 1 of the Rules of the High Court. The order in its material parts says '... a judgment or order which requires a person to do an act must specify the time after service of the judgment or order, or some other time within which the act is to be done'. He submits that as there is no time specified in the Judge's order, the order itself is invalid and therefore should be set aside as being of no affect. *Mr Mok for the plaintiffs submits that this is*

> *not the type of order contemplated by* O 42 r 1. *It does not require the doing of any act on the part of the defendants. The order merely contemplates passivity on the part of the defendants to enable the plaintiff to carry out their lawful right to inspect the Company's books and indeed to perform their duty as the Company's directors to ensure that the Company is being properly managed.* It is only now when the defendants are refusing to comply with the Judge's unopposed order that as part of the enforcement process the Court is being invited to impose time limits for the defendants to allow inspection. If there be any doubt as to the validity and correctness of the order as drafted Mr Mok draws attention to *Atkin's Court Forms* (1992) Vol 10, Form 236 which is the form of application for leave to inspect the Company's book which the plaintiffs' solicitors have adapted to suit this situation in drafting the originating summons and Form 238 which is the form of order giving leave to inspect the Company's books which has also been adapted to suit this case. The significant aspect is that no time limit appears within which the order for inspection has to be complied with. *I am sure that Mr Mok's analysis is the correct one and that the order, as drafted and approved by the Court, is perfectly valid and effective for an order such as this with the result that Mr Cheng's preliminary point falls*. (Emphasis added.)

[41] However a closer reading of the judgment would lead one to be more inclined to share the views expressed by the defendant that the inspection order in that case is more of a positive order. In the first place the case does not rule that an inspection order is a direction preventing an act. Further, in that case the plaintiff which sought to enforce the order also applied for the court to impose time limits for compliance as a separate order.

[42] This plainly suggests that an inspection order is only enforceable with a time stipulation, hence being in the nature of a positive order. Also the terms of the inspection order in *Re Hitachi* itself is not reproduced in the judgment in that case, rendering a true analysis and comparison incomplete.

[43] And I cannot but agree with the submission of the defendant that the nature of the inspection order in Malaysia has been addressed by the High Court decision in *Patricia Liew Yam Ngoon v MME Fashion Sdn Bhd* [1996] 5 MLJ 127 which examined the penal endorsement of an inspection order made under s 167(5) of the Companies Act 1965 in the following terms:

> This brings me to the dominant issue of whether the endorsement of the notice should be made on the said order. Order 42 r 6(1) *states that an order which requires a person to do an act must specify the time after service of the order, or some other time, within which the act is to be done.*
>
> ...
>
> It is to be noted that in the instant case the said order was made under s 167(6) of the Companies Act 1965 ('the Act') which is in pari materia with s 167(5) of the Singapore Act. *It does not state the time within which the defendant was to allow the plaintiff (who is a director of the defendant company) and the approved company auditor acting for the plaintiff to examine the records and books of the defendant.*

Under the circumstances of this case, on the authorities I rule that the said order is not enforceable under O 45 r 5 and consequently the endorsement of the said order with the notice is improper and should be deleted. In consequence I order that the said order be re-drawn and perfected accordingly.

[44] Clearly, the inspection order in that case was regarded as one requiring an act to be done, and given that it did not stipulate time for compliance, was ruled incapable of enforcement under O 45 r 5 of the former Rules of the High Court 1980 (equivalent to the present O 45 r 5 in the RC 2012).

[45] Similarly O 45 r 7(6) of the RC 2012 makes it clear that a passive order — an order requiring a person to be abstain from doing an act may be enforced notwithstanding absence of personal service on the alleged contemnor provided he has had notice thereof. O 45 r 7 reads as follows:

7 Service of copy of judgment or order prerequisite to enforcement under rule 5 (O 45 r 7)

(1) In this rule, references to an order shall be construed as including references to a judgment.

(2) *Subject to Order 26, rule 7(3), and paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 5 unless —*

(a) *a copy of the order had been served personally on the person required to do or abstain from doing the act in question; and*

(b) *in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.*

(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1)(B) or (C) unless —

(a) a copy of the order has also been served personally on the officer against whom an order of committal is sought; and

(b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act.

(4) There shall be endorsed on the copy of an order served under this rule a notice in Form 83 informing the person on whom the copy is served —

(a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and

(b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to

A abstain from doing an act, that if the body corporate disobeys the order, the body corporate is liable to process of execution to compel the body to obey it.

(5) With the copy of an order required to be served under this rule, being an order requiring a person to do an act, there shall also be served a copy of any order made under Order 3, rule 5, extending or abridging the time for doing the act and, where the first-mentioned order was made under rule 5(3) or 6 of this Order, a copy of the previous order requiring the act to be done.

(6) *An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either —*

(a) *by being present when the order was made; or*

(b) *by being notified of the terms of the order, whether by telephone, telegram or otherwise.*

(7) Without prejudice to its power under Order 62, rule 5, the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so.

[46] However, as stated earlier, prayer 1 of the inspection order is a form of a positive order. It requires an act to be done. This is further supported by *Patricia Liew Yam Ngoon.*

[47] In any event there is no real difficulty in my holding that prayer 1 of the inspection order envisages in its terms the need for the defendant to perform instead of refrain from undertaking certain act. Prayer 1 merely compels the defendant to ensure that the accounting records were open to inspection by the auditor and be available for the auditor to make copies.

[48] I understand that the plaintiff is saying that the defendant would be in compliance with the inspection order by simply *letting* the plaintiff's auditors undertake the necessary actions of inspection and copying the accounting records. The defendant in that sense would not be required to do any act. The defendant must also not prevent the auditors from performing the tasks. So the proposed contemnors, according to the plaintiff is under the terms of prayer 1 of the inspection order directed to abstain from doing an act, which is to refrain from preventing the inspection.

[49] In my view, this account of the role of the defendant in the context of the inspection is incomplete and inaccurate. Whilst the defendant was expected not to prevent the inspection, it is not in doubt that such prohibition

is not stated in the inspection order. The thrust of the inspection order is not so much of directing the defendant not to prevent or disrupt the inspection process. Not at all.

[50] Instead, prayer 1 of the inspection order focuses more on the need for the defendant to make available and open for inspection the accounting records. The inspection order requires the defendant to cooperate and facilitate the process.

[51] Surely in order to achieve that it would have necessitated the defendant taking active and positive steps to make it happen. By purely refraining from say preventing, the defendant would not have complied with the inspection order. This is because merely abstaining from preventing would not be the same as making available the accounting records for inspection.

[52] This is therefore far from mere passivity as contended by the plaintiff. Instead in order to obey the inspection order, the defendant would have to compile the documents or get them to be properly accessible, more so if available only in computer or online system, as well as to arrange for access to the office for the physical inspection and to address all the logistics relating thereto.

[53] In my judgment plainly, facilitating and making available the accounting records for inspection and copying, which are the directions of prayer 1 imposed on the defendant can hardly be said to be a form of abstaining from preventing inspection of the accounting records.

[54] Accordingly, given that the inspection order, being an order containing a direction to the defendant to do an act did not stipulate the time for compliance as required under O 42 r 6(1) of the RC 2012, enforcement of the inspection order for any alleged infringement thereof by the proposed contemnors cannot be pursued under O 45 r 5.

[55] The substantive hearing for committal against the proposed contemnors — the defendant, Suresh and Azian — is no longer legally possible and must fail. As such, leave earlier granted to the plaintiff to commence committal proceedings against them must be set aside.

[56] The exact same consequence follows the failure on the part of the plaintiff to effect personal service of the inspection order on Suresh and Azian, contrary to the requirements of O 45 r 7(6) of the RC 2012. There can thus also be no enforcement of the inspection order against the two under O 45 r 5 as a result. This is therefore another reason why the leave earlier granted should be set aside.

Whether the inspection order is too wide and ambiguous

[57] The proposed contemnors argue that the inspection order is vague since there is no start date and end date to the inspection exercise, rendering it to be operating in perpetuity. Further, the accounting period relevant to the documents subject to the inspection was also not identified. The scope of the inspection order is thus argued to be unreasonably wide, equivocal and incongruous even to the extent of rendering compliance impossible.

[58] At first blush, one would tend to agree with the plaintiff's argument that para 1 of the inspection order applies as long as the plaintiff remains a director and that the accounting records required to be made available for inspection are the records required to be kept under s 167. Indeed as long as he remains a director, the plaintiff himself is entitled to inspect the accounting records, like the plaintiff stated in his written submissions, without any cut off dates, unrestrained by any protocols or procedures, or any need for an advanced list of identified documents be produced. I have also said much to the same effect in *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2018] 8 MLJ 394.

[59] However, this unbridled right of inspection concerns only the directors because the proper discharge of their duties as directors under the law would require such access to company records. And this is statutorily enacted in the former s 167(3) of the Companies Act 1965.

[60] The inspection order on the other hand gives the inspection right to *the auditor* of the plaintiff director under s 167(6) which reads as follows:

> (6) The Court may in any particular case order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, but only upon an undertaking in writing given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.

[61] However, an auditor of a director does not have the exact same right of inspection as the director. The inspection by the auditor can only be done, as presently under s 167(6), upon an order granted by the court. It must be emphasised that the complaint was originally against the issue of lack of access given to the plaintiff as a director of the defendant company the right to inspect company records. The remedy sought by and granted to the plaintiff in the inspection order is to enable his auditor to undertake the inspection. It is strictly unnecessary for an order for the plaintiff himself be given access since he is always vested with such inspection right under the law.

[62] The point is however, since the inspection order authorises the auditor who does not have the same inspection right as a director he represents, it cannot be said that the right of the auditor is similarly unbridled. Section 167(6) itself recognises certain elements of distinction and limitation in the role undertaken by the auditor by virtue of the words 'in any particular case'. Under such circumstances, it is in my view not inaccurate to state that the inspection order is ambiguous and equivocal in its scope to the extent that enforcement for an alleged non-compliance cannot be sustained.

[63] In this connection, it is useful if reference is again made to the decision in *Dewan Perniagaan Melayu, Malaysia Negeri Johor v Menteri Besar Johor & Ors* [2017] MLJU 562; [2017] 10 CLJ 632, where I stated thus:

> Important set of principles on contempt charge
>
> [36] The law governing the grant of committal orders is fairly settled. A discussion on the same is unnecessary for the purposes of this instant application. However, as distilled from the various authorities, as a guide, I wish to reiterate, in summary fashion, four key principles that courts must take into account when examining the terms of the court orders contended to have been infringed or not complied with by an alleged contemnor. These are:
>
> (a) Contempt proceedings are criminal in nature because they involves the liberty of the alleged contemnor (see the Federal Court decision in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 AMR 429; [2012] 2 CLJ 849);
>
> (b) A charge of contempt must therefore be proved beyond reasonable doubt (see the English Court of Appeal decision in *Re Bramblevale* [1970] Ch 128);
>
> (c) It is a fundamental principle of fairness that no order of court will be enforced by committal unless it is expressed in clear and unambiguous language (see the Court of Appeal decision in *Dato' Seri Yusof b Dato' Biji Sura @ Mohamad v BTM Timber Industries Sdn Bhd & Ors* [2010] 1 MLJ 644; [2009] 5 CLJ 412); and
>
> (d) Any ambiguity and uncertainty must be resolved in favour of the alleged contemnor (see the Supreme Court decision in *Huong Hai Hong & Anor v MBf Holdings Bhd & Anor (and 3 Other Appeals)* [1995] 4 CLJ 427).

[64] The inspection order, prayer 1 in particular, is patently open ended. Given that it is intended to allow the auditor of the director to conduct the requisite inspection, the open-endedness and the lack of specificity on the accounting periods render the inspection order vague, too wide and ambiguous.

[65] Committal proceedings must only be pursued on the basis of the enforcement of court orders which are expressed in clear language and devoid

of uncertainty. The benefit of the uncertainty and ambiguity in the present inspection order must at any rate be given to the alleged contemnors — the defendant, Suresh and Azian. On this basis too, the ex parte leave ought to be set aside.

Whether there was failure in full and frank disclosure

[66] The other main bone of contention relates to the period between 8 March 2017 and 3 April 2017, just before the grant of the ex parte leave. The issue is the plaintiff earlier alleged (and crucially, this is a main allegation of contempt against the proposed contemnors) that the defendant had failed to make available for inspection documents listed by the plaintiff as 'Missing Documents as at 23.3.2017'.

[67] It is the case of the proposed contemnors that the plaintiff had failed to fully and frankly disclose in its application for the ex parte leave the material fact concerning the efforts taken by the defendant in its attempts to provide the said documents and to comply with the inspection order.

[68] As stated earlier, the plaintiff denied that there was any material non-disclosure in obtaining leave. In particular, the plaintiff maintains there was full and frank disclosure of all material matters including that occurred between 8 March 2017 and 3 April 2017 which had been included in the plaintiff's third affidavit (encl 106) which was referred to in the application for leave.

[69] In my view, this is where the lapse on the part of the plaintiff is incurably defective and fatal. The plaintiff did not proffer any reasons why a further amended statement under O 52 ('O 52 statement') could not have been done to reflect the latest position as at the hearing for the leave to state this material fact instead of having it averred in the said affidavit (even though the plaintiff did earlier amend the O 52 statement once in encl 117).

[70] The law is well settled. O 52 r 3 of the RC 2012 on the requirement for leave to commence committal proceedings reads as follows:

> 3 Application to Court (O 52 r 3)
>
> (1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.
>
> (2) An application for such leave must be made ex parte to the Court by a notice of application supported by *a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the*

application is made, verifying the facts relied on.

[71] The critical importance of the O 52 statement cannot be emphasised enough. Given its specific mention in O 52 r 3 which governs the application for leave, it is absolutely pivotal that the court assess the sufficiency of the O 52 statement at the leave stage prior to it be granted to commence the substantive committal proceedings.

[72] In *Syarikat M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112, the High Court ruled that the grounds on which an order of committal is sought as set out in the O 52 statement must be set out with sufficient particularity to enable the person alleged to be in contempt to meet the charge. Vohrah J referred with approval to the following passages from the judgment of Nicholls J in *Harmsworth v Harmsworth* [1987] 3 All ER 816 which emphasised that averments in affidavits cannot cure omissions in the O 52 statement:

> So the test is, does the notice give the person alleged to be in contempt enough information to enable him to meet the charge? In satisfying this test it is clear that in a suitable case if lengthy particulars are needed they may be included in a schedule or other addendum either at the foot of the notice or attached to the notice so as to form part of the notice rather than being set out in the body of the notice itself. But a reference in the notice to a wholly separate document for particulars that ought to be in the notice seems to me to be a quite different matter. I do not see how such a reference can cure what otherwise would be a deficiency in the notice. As I read the Rules of Court and as I understand the decision in the *Chiltern* case the rules require that the notice itself must contain certain basic information. That information is required to be available to the respondent to the application from within the four corners of the notice itself. From the notice itself the person alleged to be in contempt should know with sufficient particularity what are the breaches alleged. A fortiori, in my view, where the document referred to is an affidavit, which does not set out particulars in an itemised form, but which leaves the respondent to the committal application to extract and cull for himself from an historical narrative in the affidavit relevant dates and times and so forth, and to work out for himself the precise number of breaches being alleged and the occasions on which they took place. I do not think, therefore, that if there are deficiencies in the notice issued on 22 June, these deficiencies should be regarded as having been cured by reason of the references in para. 1 to the affidavit attached to the notice and in para 2, to the affidavit accompanying the notice.'

[73] Although *Syarikat M Mohamed* concerned the substantive committal stage, it is the correct position in law that the examination on the test of sufficient particularity of the O 52 statement must be judicially performed at the leave stage. The Court of Appeal in *Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang* [2013] 5 MLJ 541; [2013] 1 CLJ 1060 made it clear that any question whether an ex parte leave to commence committal proceedings is

wrongly obtained must be dealt with first since it is the foundation in the process of committal proceedings.

[74] The following passages from the judgment of Abdul Wahab Patail JCA highlight the significance of a full and frank disclosure of relevant facts in the requisite O 52 statement, as follows:

> It must also be borne in mind that the application for leave to commence committal proceedings is made ex parte. To enable the court to make a fair and just decision, it must necessarily have all the relevant facts before it. In an ex parte application, it means the applicant must set out the facts fairly, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application if it were an inter parte application. If any fact is likely disputed by the other party, the applicant must say so and give his reasons why such dispute is not sustainable, or is irrelevant or immaterial. There is no reason not to be able to do so for after all only the applicant has the opportunity to be heard upon it in the ex parte application. It certainly does not mean the applicant is entitled to merely state the facts favouring his application and the court must rely on that alone. Otherwise the leave procedure would cease to be a safeguard and instead easily become a tool exploited for oppression.

[75] I have also highlighted the importance of O 52 statement in the case involving leave application in *Dewan Perniagaan Melayu Malaysia Negeri Johor v Menteri Besar Johor & Ors* [2016] 7 MLJ 1 (which is a different proceeding than the other case with the same parties referred to earlier which deals with the substantive committal hearing), where I stated:

> [33] The importance of the O 52 statement was further emphasized by Arifin Zakaria CJ in *Tan Sri Dato (Dr) Rozali Ismail & Ors v Lim Pang Cheong & Ors* [2013] 3 MLJ 458; [2012] 2 CLJ 849 in the following terms:
>
> > We wish to state in clear term that the alleged act of contempt must be adequately described and particularized in detail in the statement itself. The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. *Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time*. The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself. The same approach was taken by the Supreme Court in *Arthur Lee Meng Kwang case, supra* (see also *Sykt M Mohamed v Mahindapal Singh Joginder Singh & Ors* [1991] 1 CLJ 582; [1991] 4 CLJ Rep 16).
>
> [34] The very essence of the insistence on the adherence to sufficient particularity of O 52 statement is so that a proposed contemnor is fully aware of the case of contempt instituted against him. This is the rationale for the grounds of the application to be clearly described in the O52 Statement, and to be verified by the accompanying affidavit in support, as clearly stipulated under Order 52 r 3(2) of the RC 2012. (Emphasis added.)

[76] It bears emphasis that committal proceedings are criminal in nature since the same involve the liberty of the alleged contemnor (see the Federal Court decision in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 CLJ 849). In *Re Bramblevale Ltd* [1970] Ch 128, Lord Denning MR in his characteristic inimitable style stated the principle on the applicable standard of proof for contempt proceedings:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time — honoured phrase, it must be proved beyond reasonable doubt.

[77] This necessitates the charge of contempt against the proposed contemnor to be absolutely clear and all procedural requirements are fully and strictly observed. But the full and material facts surrounding the accusation of non-observance of the inspection order against the defendant were not particularised in the amended O 52 statement. The facts concerning the attempts by the defendant to make available certain of the documents were only included in the accompanying affidavit. This is clearly a departure from what the law on contempt has so specifically provided for. On this ground alone, the leave granted to institute contempt proceedings against the proposed contemnors ought to be set aside.

Other defects justifying set aside

[78] Even though the above analysis has found a number of grounds each of which warranting the setting aside of the ex parte leave, for completeness I should add that in the case of Azian, the pursuit of contempt against her is unsustainable and cannot be pursued also by reason of the fact that (other than the various reasons stated earlier) she was not named in the penal endorsements in the inspection order. This is a non-observance of O 45 r 7(4) which states:

> (4) *There shall be endorsed on the copy of an order served under this rule a notice in Form 83 informing the person on whom the copy is served —*
>
> (a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and
>
> (b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, the body corporate is liable to process of execution to compel the body to obey it. [emphasis added]

[79] Azian was never personally served with the inspection order in the first place, and neither was she named in the penal notice. She was thus never put on notice to the act ordered to do, disobedience of which will subject her to penal consequences (see *Iberian Trust, Limited v Founders Trust and Investment Company, Limited* [1932] 2 KB 87). And authorities such as the Court of Appeal in *Loh Eng Leong & Anor v Lo Mun Sen & Sons Sdn Bhd & Anor* [2003] 4 MLJ 284 have held that failure to indorse an order of court with a penal notice is fatal to an application for committal.

[80] Further, O 45 r 5(1)(B) envisages an 'officer' against whom committal may be pursued to be an officer of a body corporate, and this body corporate is the entity which is alleged to have failed to do the act it was directed to do as specified in the order of court. But Azian is not an officer of the defendant company which is subject to the inspection order. She is a representative of a shareholder of the defendant. This renders her not to be a proper party to the committal proceedings.

CONCLUSION

[81] In view of the reasons I have set out in the foregoing analysis, it is my judgment that I cannot arrive at any conclusion other than the inevitable finding that the proposed contemnors have successfully established the case to have the ex parte leave granted to the plaintiff to initiate committal proceedings against the proposed contemnors, to be set aside. I therefore allow encls 125 and 127, with costs to the proposed contemnors.

Enclosures 125 and 127 allowed with costs.

Reported by Mohd Kamarul Anwar